STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN SLOAN,

Defendant-Appellant.

UNPUBLISHED
September 16, 2003

No. 240083
St. Clair Circuit Court
LC No. 01-002835-FH

Before: Smolenski, P.J., and Murphy and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of fourth-degree criminal sexual conduct (CSC IV), using force or coercion, MCL 750.520e(1)(b), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with CSC IV on an aiding and abetting theory in connection with an incident alleged to have occurred at the home of a friend. The complainant testified that when he and his cousin went to the home, defendant answered the door, and pulled him into the home. Defendant and another man forced him into a bedroom, defendant pinned him against a dresser, and the other man grabbed his buttocks. The complainant's cousin testified that defendant forced complainant into the home. The cousin did not see or hear what happened in the home. Based on the complainant's statement, which included accurate descriptions of defendant and his companion, a police officer arrested defendant. Defendant acknowledged that he assaulted the complainant, but denied that the assault was sexual in nature.

Defendant first argues that the trial court erred in denying his motion for new trial because the verdict was against the great weight of the evidence. In reviewing such a motion, the court must consider all the proofs and determine whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). We review a trial court's decision on a motion for a new trial for an abuse of discretion. *Id.* at 27.

One form of CSC IV occurs when a person uses force or coercion to accomplish sexual contact with another. Force or coercion includes: (1) the actual application of physical force or violence; (2) threatening to use force or violence; (3) threatening to retaliate in the future; and (4) when the actor engages in inappropriate medical treatment or examination of the victim. MCL 750.520e(1)(b). To support a finding that a defendant aided and abetted a crime, the prosecution

must show that: (1) the crime was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement which assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. *People v Carines*, 460 Mich 750, 757-758; 597 NW2d 130 (1999).

In this case, if believed, the complainant's testimony was sufficient to prove defendant committed CSC IV on an aiding and abetting theory. Complainant's testimony did not require corroboration, MCL 750.520h, and the jury was entitled to accept complainant's testimony as credible, *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Although testimony by other witnesses conflicted with the complainant's, issues of credibility are for the trier of fact and play no role in the court's determination regarding a motion for new trial. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998); *Gadomski, supra* at 28. We find that the trial court did not abuse its discretion in denying defendant's motion for new trial.

Defendant also argues that he was denied the effective assistance of counsel at trial. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id*. at 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant has failed to establish that any action that defense counsel took or failed to take resulted in prejudice. Contrary to defendant's assertion, defense counsel did not represent him in a separate matter. Counsel represented the mother of a child in a termination proceeding in which defendant was identified as the putative father. Defense counsel did err in informing defendant that he was not entitled to take a polygraph examination. MCL 776.21(5). But even if defendant had taken a polygraph examination, the results could not have been admitted at trial. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003).[1] Defendant's assertion that he would have passed a polygraph examination and that the results would have forced the police to investigate the matter further is based entirely on speculation, as is his contention that the complainant would have been unable to identify him in a lineup. The complainant was able to

[1] Under limited circumstances, a trial court may consider the results of a polygraph examination when deciding a motion for a new trial based on newly found evidence. *People v Cress*, 250 Mich App 110, 135-136; 645 NW2d 669 (2002), rev'd in part on other grounds 468 Mich 678 (2003). Defendant's motion for a new trial was not based on newly found evidence; therefore, even if defendant had taken a polygraph examination, the results could not have been considered by the trial court in deciding the motion.

give an accurate description of defendant very soon after the incident occurred. We find that counsel's decision to forego requesting a lineup was trial strategy. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Lastly, defendant's claim of ineffective assistance of counsel regarding the jury selection process is meritless. Contrary to defendant's assertion, defense counsel did voir dire the jury venire. And we believe that defense counsel's decision not to exercise peremptory challenges or challenges for cause are soundly within the realm of trial strategy. There is nothing in the record that persuades us that counsel abrogated her duty to defendant during the jury selection process and defendant does not identify any particular jurors that defendant believes should have been removed. Defendant may not simply announce his position and leave it to this Court to discover and rationalize the basis for his claim. *Mudge v Macomb Co*, 458 Mich 89, 105; 580 NW2d 845 (1998). Accordingly, we find that defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Kurtis T. Wilder